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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

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ARIZONA PUBLIC SERVICE
COMPANY, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO, LOCAL 387

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

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# BRIEF FOR THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 387 IN OPPOSITION

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## QUESTION PRESENTED

Did the National Labor Relations Board abuse its discretion in finding the production and maintenance employees at the Arizona Public Service's newly constructed Palo Verde Power Plant to constitute an accretion to the existing system-wide bargaining unit of production and maintenance employees represented by International Brotherhood of Electrical Workers, AFL-CIO, Local 387?

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# BRIEF FOR THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 387 IN OPPOSITION

## STATEMENT

1. Background.

Arizona Public Service (hereinafter "APS") is a public utility which supplies electric power throughout Arizona. (R. 7.) Its headquarters are located in Phoenix. (R. 65.) APS operates six fossil fuel and one small hydro-electrical generating plants at separate locations in Arizona and New Mexico. (R. 68, 352.) The power generated by each of these plants feeds into one distribution system and is dispatched to customers by dispatchers located in Phoenix. (R. 351.)

Since as early as 1947, APS has recognized the International Brotherhood of Electrical Workers, AFL-CIO, Local 387

(hereafter "the Union"), as the collective bargaining representative of the production and maintenance employees employed by APS throughout its system. (R. 442.) Since the initial recognition, production and maintenance employees at newly acquired or constructed facilities have uniformly been incorporated into the existing system-wide bargaining unit. (R. 447-448.)[1/] Contrary to APS (Brief 5), none of such employees were added to the bargaining unit through Board certifications. (R. 457-459.)

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1/ As the Board noted (Pet. App. 43), the parties disagreed about the circumstances surrounding the extending of recognition to the Union as representative of employees at facilities as they were added to the utility system over the years. Thus, while APS asserts that it extended recognition only upon some showing of the Union's majority status at each new facility, the Union's evidence showed that the Union had not demonstrated its majority status and that the Union had simply bargained about new plants prior to their opening. (R. 448, 467-469.) The Union's evidence (R. 457-459) further showed that it petitioned for elections only when it sought to represent previously existing but unrepresented job classifications at existing plants.

In 1972, APS began construction of a nuclear power plant at Palo Verde, Arizona, 55 miles from Phoenix. (R. 27-29.) At the time of the hearing in this matter, the plant had not been put into operation but there had been employed approximately 62 employees in production and maintenance classifications. Twelve to 13 of these employees had been previously employed at one of the other APS power plants. (R. 38, 62.)

2. The representation proceeding.

In December, 1980, after having failed to agree that the production and maintenance employees at the Palo Verde Plant should be deemed accreted into the single system-wide bargaining unit, both APS and the Union filed Petitions with the NLRB on December 15, 1980. APS filed an RM Petition seeking an election. The Union filed a UC Petition

seeking an order clarifying the collective bargaining unit as including the production and maintenance employees at the Palo Verde Plant. (R. 496; Pet. App. 89, 94.)

Following the hearing and a transfer of the case to the Board, the Board, on June 5, 1981, issued its decision finding that the 62 Palo Verde production and maintenance employees constituted an accretion to the 1,200 employee system-wide production and maintenance unit represented by the Union. (Pet. App. 29.)

After the Board's decision, a number of the Palo Verde employees filed an obviously untimely petition. It was dismissed. (Pet. App. 90-93.)

3. The unfair labor practice proceeding.

Beginning in June, 1981, the Union requested that APS deal with it as the exclusive representative of the Palo Verde

employees. APS refused; the Union filed an unfair labor practice charge; and on September 1, 1981, a complaint issued charging the Company with a refusal to bargain. APS answered, admitting its refusal, but defended on the grounds that the Board had erred in determining that the Palo Verde employees constituted an accretion to the existing bargaining unit. The Board on December 3, 1981, issued its Decision and Order granting the Board's General Counsel's Motion for Summary Judgment, finding APS to have refused to bargain in violation of the Act. (Pet. App. 47-67.)

Upon review by the Ninth Circuit Court of Appeals, that Court reviewed the several factual conclusions upon which the Board's Decision was based and concluded that the Board's legal conclusion that the accretion determination was proper. (Pet. App. 21-27.)

## SUMMARY OF ARGUMENT

To the NLRB and to the circuit courts, the concept of accretion has long been accepted as a viable doctrine available to the NLRB in resolving bargaining unit issues. Its application in this case was neither novel nor precedent-setting; nor was it without factual support.

## ARGUMENT

1. Standard of review.

The Board's function in determining whether there has been an accretion in a given situation "is similar to its function of determining the appropriateness of particular units for bargaining purposes. . . . The determination is one involving the Board's discretion and should not be set aside unless a reviewing court is convinced that the Board has acted in an arbitrary and capricious manner." Lammert

Industries v. NLRB, 578 F.2d 1223, 1225 (7th Cir., 1978), quoting NLRB v. R. L. Sweet Lumber Co., 515 F.2d 785, 794 (10th Cir., 1975). See also Sheraton-Kauai Corp. v. NLRB, 429 F.2d 1352, 1355 (9th Cir., 1970); NLRB v. Sunset House, 415 F.2d 545, 547-548 (9th Cir., 1969); Universal Security Instruments, Inc. v. NLRB, 649 F.2d 247 (4th Cir., 1981) [cert. den. 454 U.S. 965]; and NLRB v. Baton Rouge Waterworks Co., 417 F.2d 1065 (5th Cir., 1969).

2. Applicable principles.

An accretion is simply the addition of employees to an already existing unit where there exists such a community of interest that the accreted employees are properly governed by the larger group's choice of bargaining representative. NLRB v. Food Employers Council, Inc., 399 F.2d 501, 502 (9th Cir., 1968); Lammert Industries v. NLRB, supra. The accretion issue typically

arises in the context of the opening of a new facility [Goodyear Tire & Rubber Company, 195 NLRB 767 (1972), enf. 474 F.2d 1336 (2d Cir., 1973); Armour & Co., 172 NLRB 1649 (1968)], the subdivision of a facility [Parkview Drugs, Inc., 138 NLRB 194, 195 (1962)], or some other operational change that creates a new group of employees [Massey Ferguson, Inc., 202 NLRB 193 (1973); The Great A & P Tea Co., 140 NLRB 1011 (1963)].

The Board, in determining whether a new group of employees is accreted into an existing bargaining unit, must balance the right of employees to select a bargaining agent against the concomitant statutory policy of maintaining stability of established bargaining relationships. The Great A & P Tea Co., supra. In striking this balance, the Board examines a variety of factors including integration of operations;

centralization of managerial and administrative control; similarity of working conditions, functions, job classifications, and skills; centralization of control over labor relations; bargaining history; interchangeability of employees; and geographic proximity. Universal Security Instruments, Inc. v. NLRB, supra; NLRB v. Sunset House, supra; NLRB v. Baton Rouge Waterworks Co., supra. It is not necessary that all of the listed factors be present. Rather, it is for the Board to determine "the factors relevant to the accretion issue in the case under consideration . . . [and] then decide the relative weight to be attributed to each factor." Universal Security Instruments, Inc. v. NLRB, supra. Where the relevant factors demonstrate that the new employees have a community of interest sufficiently distinct from the existing unit to constitute a separate appropriate unit, the Board

will not find an accretion. Melbet Jewelry Co., 180 NLRB 107 (1969), cited with approval Sheraton-Kauai Corp. v. NLRB, supra. However, where the new employees have no separate unit identity and inclusion would result in a more efficient collective bargaining relationship, the Board appropriately determines that the new employees do constitute an accretion to an existing unit. See Westinghouse Electric Corp. v. NLRB, 440 F.2d 7, 11 (2d Cir., 1971); NLRB v. Retail Clerks Local 588, 587 F.2d 984, 987 (9th Cir., 1978).

In making unit determinations in the utility industry, the Board has placed particular emphasis on the factors of operational integration and centralized administration. Recognizing that the utility industry is characterized by a high degree of operational integration, the Board generally is reluctant to find

appropriate units that are less than system-wide in scope. See Baltimore Gas & Electric Co., 206 NLRB 199, 201 (1973) (unit limited to employees at employer's eight fossil fuel plants inappropriate); Colorado Interstate Gas Co., 202 NLRB 847, 848 (1973); Michigan Wisconsin Pipe Line Co., 194 NLRB 469 (1971) (one district not appropriate; employer was highly integrated and regulated flow of gas from headquarters).

The Board's reluctance to fragmentize a utility's operations is based upon "the economic reality that the public utility industry is characterized by a high degree of interdependence of its various segments and that the public has an immediate and direct interest in the uninterrupted maintenance of the essential services that this industry alone can adequately provide." Baltimore Gas & Electric Co., supra. Indeed, the Board finds less than stystem-

wide units to be appropriate only where employees work in separate administrative subdivisions or service distinct geographic areas, have separate communities of interest, and have no system-wide bargaining history. See Baltimore Gas & Electric Co., supra; Colorado Interstate Gas Co., supra. See also Indiana Telephone Co., Inc., 229 NLRB 187 (1977).

To round off this statement of applicable principles, it is pertinent to note specifically the two lines of cases where the accretion doctrine will not apply. First, there are those cases, as noted above, involving the addition of new employees who have a community of interest sufficiently distinct from the existing unit to constitute in itself a separate bargaining unit. Melbet Jewelry Co., supra.

The second type situation exists (1) when a group sought to be accreted has

existed since the bargaining unit's formation but has been excluded from the unit by the parties, (2) when a group has come into existence after a union's recognition but has been knowingly excluded from the unit for a substantial period of time, or (3) when there is some other evidence that the parties intended to exclude the particular group of employees. In such circumstances, the bargaining history demonstrates that the exclusion has not resulted in an unstable bargaining relationship and that the parties themselves have recognized that exclusion does not interfere with the bargaining relationship. Thus there is no countervailing policy to warrant limiting employee free choice. See The Bendix Corporation, 168 NLRB 371, 372 (1967); Gould National Batteries, Inc., 157 NLRB 679, 681 (1966); and Plough, Inc., 203 NLRB 818 (1973).

Phototype, Inc., 145 NLRB 1268 (1964) and Remington Rand Division, 190 NLRB 844 (1971), upon which APS relies (Brief 12), are both cases in which there was a bargaining history demonstrating the exclusion of, or intent to exclude, the employees sought to be accreted. In Phototype, the Board emphasized the fact that the unrepresented employees had been working for the employer for seven years and that the employees had been excluded from the bargaining unit for that period of time. Similarly, in Remington Rand Division, the decisive factor in the Board's refusal to find an accretion was the bargaining history of long-term exclusion of certain job classifications from the existing unit.

Duke University Hospital, 227 NLRB 1627 (1977); Mt. Sinai Hospital, 233 NLRB 507 (1977); and Comax Telcom Corp., 219 NLRB 688 (1975), all relied upon by the

Petitioner APS, involved factual situations involving the type situation where the unrepresented employees had worked outside the established bargaining unit for a number of years before the issue of their representational status was presented. Hence the doctrine of accretion was not applicable. For the same reason, the Petitions filed by the Union relative to meter readers at APS, warehousemen at APS, fuel specialists at APS, cathodic protection testers at APS, auto parts clerks at APS, and credit department employees at APS (Pet. Brief 5-6; Pet. App. 81-88) specifically sought elections rather than unit clarifications as in the instant case. All of such Petitions involved employee groups who had long been knowingly excluded from the production and maintenance unit. They were not new employees being added to existing

classifications covered by the agreement. "They were long-time employees" who had not been covered by the collective bargaining agreement. (R. 495, ll. 6-9; R. 493-496.)

3. The Board properly exercised its discretion in finding the Palo Verde employees to be an accretion.

A number of factors--the Company's centralized and integrated operation, its centralized control of labor relations, the similarity of employee terms and conditions of employment and job functions, employee transfers and the system-wide bargaining history--weigh heavily in favor of the Board's accretion finding. Of equal importance, the record shows--and the Company admits--that the Palo Verde employees do not constitute a separate appropriate unit for purposes of collective bargaining.

As the Board found (Pet. App. 32), the Palo Verde Plant neither constitutes a separate administrative subdivision nor serves a distinct geographic area, but rather is part of a highly integrated and centralized operation. Thus, as shown in the Statement, all electricity produced--regardless of the generating process--feeds into one system and is provided to customers by dispatchers located in a central office in Phoenix. The integration of operations is reflected, as the Board observed (Pet. App. 32), in the Company's centralized administration of the operation of the power plants. The generation, transmission and distribution of electric power is controlled and monitored by the corporate vice president of electrical operations and his supporting staff. This corporate official, to whom all the plant managers ultimately

report, is responsible for overseeing all of the Company's generating facilities. (R. 45, 574-575.)

The record also demonstrates that significant aspects of the Company's labor policies are centrally determined and that the Company does not treat the Palo Verde Plant differently from its other facilities for labor relations purposes. The benefits granted to Palo Verde employees are determined at the Company's headquarters, and all of the Company's unrepresented employees, wherever located, receive the same benefits. (R. 274.) Job openings at any facility are posted at all Company offices. Plant policies applicable to Palo Verde employees with respect to salary administration, grievances, and job bidding have been established at the corporate level and

apply to all of the Company's unrepresented employees. (R. 131-132, 144-145, 54.) These policies, along with additional Company rules and policies, are contained in an employee handbook which is distributed to all employees. (R. 440-441, 491.) The record also shows that headquarters officials are involved in the implementation of labor relations policies in the individual plants. For example, while grievances may be resolved at the plant level, the Company provides for an appeal to the corporate level for final decision. In addition, with respect to job vacancies, only a designated corporate official can approve a decision not to post a job.

As the Board also found (Pet. App. 34-35), the Palo Verde employees and the bargaining unit employees share similar

terms and conditions of employment. The Palo Verde employees have the same vacation, holiday, pension, dental, and medical benefits as those contained in the collective bargaining agreement. (R. 114-115.)[2/] Furthermore the salaries of

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2/ The record shows some differences in benefits such as sick leave, overtime, and participation in short term disability and savings plans between bargaining unit employees and all unrepresented employees. These different benefits are not, however, unique to Palo Verde employees and thus do not demonstrate that the Palo Verde facility has a separate identity from other Company facilities.

APS (Pet. Brief 15) points to two benefits assertedly unique to Palo Verde employees. These are the Company's provision of tools for work at Palo Verde and the Company's transportation of Palo Verde employees to work. With respect to providing tools, the record shows that the Company provides many tools to employees at the fossil fuel plants. (R. 340, 434, 490.) The additional benefit of transportation--provided because Palo Verde is located in the desert and a substantial distance from residential communities (R. 120-121)--plainly does not undermine the strong shared interests resulting from the commonality of most major benefits.

Palo Verde employees are identical or comparable to the salaries earned by bargaining unit employees in the same or analogous classifications. (E. Ex. 17, R. 164, 171; Jt. Ex. 1a, R. 11, 14.)

Further supporting the Palo Verde accretion is the fact that, as the Board found (Pet. App. 36), the Palo Verde employees and bargaining unit employees perform similar functions under the same or comparable job classifications. Thus, virtually all of the production and maintenance classifications at Palo Verde are included in the collective bargaining agreement. (R. 474, 484-489; Jt. Ex. 1a, pp. 48-57, R. 11, 14; E. Ex. 5, R. 30, 32.) Palo Verde employees classified as janitors, storekeepers and warehousemen perform the same duties as similarly classified bargaining unit employees. (R. 85, 98.) The duties of the Palo

Verde electricians are the same as the Company's other electricians. (R. 86.) Palo Verde employees classified as instrument and control (I & C) repairmen and technicians perform the same functions of calibrating, repairing and installing instruments that I & C repairmen perform at the Company's other plants. (R. 851, 419-420.)

At both Palo Verde and the fossil fuel plants, the operator functions are divided between operators who sit in the control room at control panels and those who travel throughout the plant checking equipment. (R. 356-358, 481-482.) The stationary operators--classified as control operators in the fossil fuel plants and nuclear operators level III at Palo Verde--are responsible for monitoring the condition of the plant and adjusting switches and knobs on the

control panels in response to information about the condition of the plant conveyed by the instruments in the control room. (R. 358-359, 371, 479.) The mobile operators--classified as auxiliary or assistant operators at the fossil fuel facilities and as nuclear operators level II at Palo Verde--inspect the equipment throughout the plant. (R. 481, 356-357.) Nuclear operator level I is an operator trainee position and thus is similar to the operator trainee classification at the fossil fuel plants. (R. 356, Jt. Ex. 1a, p. 53, R. 11, 14.)

The basic similarity of Palo Verde and bargaining unit job functions is demonstrated by the fact that 20 percent of the 62 production and maintenance employees at Palo Verde at the time of the hearing transferred from the

Company's other facilities using the Company's job bidding procedure (R. 62-63), and these transferees are, as a company witness stated (R. 342), well trained. The transferees include one employee who transferred from an operator position at the Company's Four Corners Plant to a nuclear operator level III position at Palo Verde, as well as employees who transferred to electrician and I & C positions. (R. 380-381, 415-416, 432, 572, E. Ex. 17, R. 164.)

Finally, the Board reasonably found the bargaining history here to militate in favor of accretion. Thus, the record shows that, since the Company's initial recognition of the Union around 1947, bargaining has always been on a system-wide basis. Furthermore, production and maintenance employees at newly acquired

or constructed facilities have uniformly been incorporated into the unit. (R. 447.)

In sum, measured against established accretion standards and the bargaining unit policies applicable to the utility industry, the record evidence of integrated and centralized operations, centralized labor policies, similar working conditions and job functions, employee transfers, and system-wide bargaining history amply demonstrate both that the Palo Verde employees do not constitute an appropriate unit for collective bargaining and that "such a community of interest exists among the entire group that the additional employees have no separate unit identity" and "thus . . . are properly governed by the larger group's choice of bargaining representative." NLRB v.

Security-Columbian Bank Note Co., 541 F.2d 135, 140 (3d Cir., 1976). Accord: Lammert Industries v. NLRB, supra; Universal Security Instruments, Inc. v. NLRB, supra; NLRB v. Baton Rouge Water-works Co., supra.

Accordingly, the Board acted well within its discretion by accreting the Palo Verde employees into the existing system-wide unit.

## CONCLUSION

This Court should not grant the instant Petition for Writ of Certiorari.

Respectfully submitted this 11th day of November, 1983.

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CERTIFICATE OF SERVICE

I, A. D. Ward, counsel of record for International Brotherhood of Elecrical Workers, AFL-CIO, Local 387, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of November, 1983, I served one copy of the Brief for the International Brotherhood of Electrical Workers, AFL-CIO, Local 387 in Opposition by depositing in a mailbox, with first-class postage prepaid, and properly addressed to the following:

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